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COURT OF CRIMINAL APPEALS
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No. PD-0788-20

IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
11/23/2020
DEANA WILLIAMSON, CLERK

ENRIQUE ANGEL RAMOS, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Hidalgo County

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STATE'S BRIEF ON THE MERITS

* * * * *

Stacey M. Soule
State Prosecuting Attorney
Bar I.D. No. 24031632

John R. Messinger
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

NAMES OF ALL PARTIES TO THE TRIAL COURT'S JUDGMENT

*The parties to the trial court's judgment are the State of Texas and Appellant, Enrique Angel Ramos.

*The case was tried before the Honorable Rose Guerra Reyna, Presiding Judge, 206th District Court, Hidalgo County, Texas.

*Counsel for Appellant in the trial court was Robert M. Capello Jr., 106 South 12th Avenue, Suite 111, Edinburg, Texas 78539.

*Counsel for Appellant on appeal was Allegra Hill, Law Offices of Brandy Wingate Voss, PLLC, 820 E. Hackberry Avenue, McAllen, Texas 78501.

*Counsel for the State at trial was Hope Palacios and Denise Santa Ana, Hidalgo County Assistant Criminal District Attorneys, 100 East Cano, Edinburg, Texas 78539.

*Counsel for the State on appeal was Michael W. Morris, Hidalgo County Assistant Criminal District Attorney, 100 East Cano, Edinburg, Texas 78539.

*Counsel for the State before this Court is John R. Messinger, Assistant State Prosecuting Attorney, P.O. Box 13046, Austin, Texas 78711.

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IN THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

ENRIQUE ANGEL RAMOS, Appellant

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* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

A person who, along with other acts of sexual abuse, engages in sexual intercourse with a step-daughter under the age of fourteen deserves to be punished for both his pattern of abuse and incest. By all indications, the Legislature agrees.

STATEMENT OF THE CASE

Appellant was convicted of both continuous sexual abuse (CSA) and prohibited sexual conduct (PSC) against the same victim—his step-daughter—during the same period. The court of appeals held that this violated the Double Jeopardy Clause's implicit prohibition against multiple punishments for the same conduct.

STATEMENT REGARDING ORAL ARGUMENT

The State did not request oral argument.

ISSUE PRESENTED

Did the Legislature intend punishments for both continuous sexual abuse, TEX. PENAL CODE § 21.02, and prohibited sexual conduct, TEX. PENAL CODE § 25.02, against the same child?

STATEMENT OF FACTS

Appellant was indicted for CSA (Count 1), PSC (Count 2), and aggravated sexual assault of a child under fourteen (Count 3).[1] The acts of sexual abuse alleged in the CSA indictment were 1) aggravated sexual assault of a child by intentionally or knowingly causing the sexual organ of the victim to contact the sexual organ of the appellant, 2) aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the victim's sexual organ by appellant's sexual organ, and 3) indecency with a child, by engaging in sexual contact with the victim by touching any part of her genitals.[2]

The victim testified that multiple acts of penile contact/penetration occurred months apart when she was twelve, in 2016.[3] She said that her step-father began touching her vagina with his hands when she was four or five.[4] Appellant described

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[1] 1 CR 7-8.

[2] 1 CR 7.

[3] 9 RR 56, 59, 63 (describing final incident, penile penetration, when she was twelve), 69 (saying it happened many times), 70-71 (describing penile penetration, in a shed, when she was twelve), 74-76 (describing incident when she pushed him away after he "went inside [her] a little bit" when she was twelve), 76 (saying the incidents were months rather than days or weeks apart).

[4] 9 RR 77-81.

the final act in 2016 as him rubbing his penis against or between her labia.[5] He said it happened four to six times in the preceding year, and he never penetrated her "completely."[6] In his interview, he described it, in part, as "touch[ing]" "her part" with his penis,[7] and rubbing but not penetration.[8]

Count 3 was submitted alternatively as a lesser-included offense.[9] The jury convicted appellant of both CSA and PSC.[10] Count 3 was dismissed.[11]

SUMMARY OF THE ARGUMENT

Convictions for distinct offenses based on the same conduct are permitted if the Legislature says so. Its intent usually must be inferred from the statutes involved. Comparison of the offenses of conviction shows 1) a presumption that multiple punishments are permitted, 2) disparate gravamina, usually the best indication of legislative intent, and 3) what appears to be an exclusive list of prohibited additional offenses that PSC is not on. Even if the analysis could be performed by comparing PSC to a predicate offense of CSA rather than CSA itself, the result is the same.

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5 10 RR 10-11 (reading State's Ex. 6, a translation of appellant's signed statement to police).

6 10 RR 11.

7 14 RR 89 (State's Ex. 4, transcript of appellant's interview, p. 81).

8 14 RR 89 (State's Ex. 4, transcript of appellant's interview, p. 84-85).

9 11 RR 93; 1st Supp. CR 24.

10 1 CR 133; 1 CR 265, 268.

11 1 CR 271.

ARGUMENT

I. The law on multiple-punishment jeopardy claims.

Double jeopardy claims come in two forms: complaints about subsequent prosecutions, and complaints about multiple punishments for the same offense in a single trial.[12] This second type can present as a defendant being punished for the same criminal act twice under two distinct statutes.[13] This is fine so long as that is what the Legislature intended.[14] In other words, the Double Jeopardy Clause places "few, if any" limitations on a legislature's power to define crimes.[15]

The main limitation was set out in *Blockburger v. United States*.[16] "The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not."[17] "The assumption underlying the rule is that [legislatures] ordinarily

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[12] *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006).

[13] *Id*. *See also Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999) ("The inquiry is whether the Legislature intended to permit multiple punishments.").

[14] *Missouri v. Hunter*, 459 U.S. 359, 366 (1983) ("With respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended.").

[15] *Garfias v. State*, 424 S.W.3d 54, 58 (Tex. Crim. App. 2014).

[16] 284 U.S. 299 (1932).

[17] *Id*. at 304. Texas courts consider the elements as modified by pleadings when applying the *Blockburger* test. *Ex parte Benson*, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015).

do[] not intend to punish the same offense under two different statutes."[18] The key there is "ordinarily."

"The *Blockburger* test is a useful tool for ascertaining legislative intent, but it is not the only tool."[19] It is the starting point,[20] however, and its outcome creates a strong presumption. If the two offenses are the "same" under the cognate-pleadings approach to *Blockburger*, it is presumed that multiple punishments were not intended.[21] That presumption can be rebutted by "a clearly expressed legislative intent" to the contrary.[22] If the two offenses pass the modified *Blockburger* test, a presumption of multiple punishments arises that must be rebutted by equally clear evidence of legislative intent.[23] Either way, the nonexclusive list of evidence of legislative intent suggested by this Court includes:

- whether the offenses are contained within the same statutory section,
- whether the offenses are phrased in the alternative,

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[18] *Whalen v. United States*, 445 U.S. 684, 692 (1980).

[19] *Ervin*, 991 S.W.2d at 814.

[20] *Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008).

[21] *Bien v. State*, 550 S.W.3d 180, 184 (Tex. Crim. App. 2018).

[22] *Id*. *See Whalen*, 445 U.S. at 692 ("[W]here two statutory provisions proscribe the 'same offense,' they are construed not to authorize cumulative punishments in the absence of a clear indication of contrary legislative intent."). This can take the form of specific authorization in the offense itself. *See*, *e.g.*, TEX. PENAL CODE § 21.16(h) (unlawful disclosure or promotion of intimate visual material) ("If conduct that constitutes an offense under this section also constitutes an offense under another law, the actor may be prosecuted under this section, the other law, or both.").

[23] *Bien*, 550 S.W.3d at 184-85.

- whether the offenses are named similarly,
- whether the offenses have common punishment ranges,
- whether the offenses have a common focus (*i.e.* whether the "gravamen" of the offense is the same) and whether that common focus tends to indicate a single instance of conduct,
- whether the elements that differ between the offenses can be considered the "same" under an imputed theory of liability, and
- whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.[24]

This Court gives more weight to the gravamen and, when a single statute is involved or when two statutes fail the *Blockburger* test, unit of prosecution.[25] This case involves two (or three) statutes and, as shown below, *Blockburger* is not a problem. Thus, as usual, "the 'focus' or 'gravamen' of a penal provision should be regarded as the best indicator of legislative intent when determining whether a multiple-punishments violation has occurred."[26]

II. Comparing CSA and PSC shows multiple punishments are authorized.

If comparison of the two offenses giving rise to multiple punishments is the proper analysis, this case is simple.

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[24] *Ervin*, 991 S.W.2d at 814.

[25] *Ex parte Benson*, 459 S.W.3d at 73.

[26] *Garfias*, 424 S.W.3d at 59. As this Court said in 2015, "In every case in which we have found the offenses to be the same under an *Ervin* analysis, the focus of each of the offenses and the units of prosecution for the offenses have been the same." *Ex parte Benson*, 459 S.W.3d at 80.

II.A. The presumption favors multiple punishments.

> Each offense has an element the other does not. A person commits CSA if:
>
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.[27]

As charged in this case, a person commits PSC if he "engages in sexual intercourse . . . with another person the actor knows to be, without regard to legitimacy . . . the actor's current or former stepchild[.]"[28] Even including the relevant act of sexual abuse alleged in the CSA indictment,[29] each offense has at least one element the other does not. This raises a presumption of legislative intent to permit multiple punishments that can be rebutted only by clear evidence to the contrary.

II.B. There is scant evidence of contrary intent.

Some of the *Ervin* factors offer marginal support for rebutting the presumption. Both offenses involve sex and use the same definition of "sexual intercourse."[30] Their names are somewhat similar, given the clinical nature of modern sex crime

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[27] TEX. PENAL CODE § 21.02(b).

[28] TEX. PENAL CODE § 25.02(a)(2); 1 CR 7 (indictment).

[29] 1 CR 7 (penetration of the victim's sexual organ by appellant's sexual organ).

[30] TEX. PENAL CODE §§ 21.01(3), 25.02(b)(2).

titles.[31] Despite these similarities, they are in separate titles of the Penal Code and their offense levels and punishments differ. CSA is a first-degree felony offense against the person (Title 5) with a minimum punishment of 25 years in prison.[32] PSC, as charged, is a second-degree felony offense against the family (Title 6).[33]

Whatever these factors are worth, however, two things prevent any indication of contrary intent sufficient to rebut the presumption of multiple punishments: their gravamina and CSA's comprehensive treatment of predicate offenses.

II.C. CSA and PSC have different gravamina.

The gravamen of an offense typically falls into one of three general types: "result of conduct," "nature of conduct," and "circumstances of conduct."[34] The gravamina of CSA and PSC are both circumstances—different circumstances.

II.C.1. Continuous sexual abuse focuses on pattern of abuse and age.

"[C]ontinuous sexual abuse is, by its very definition, the commission *under certain circumstances* of two or more of the offenses listed in Subsection (c)."[35] Its "avowed purpose" is to "'establish[] a crime that focuses on the pattern of abuse over

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[31] PSC used to be called "Incest." Acts 1973, 63rd Leg., p. 921, ch. 399, § 1, eff. Jan. 1, 1974.

[32] TEX. PENAL CODE § 21.02(h).

[33] TEX. PENAL CODE § 25.02(c).

[34] *Young v. State*, 341 S.W.3d 417, 423 (Tex. Crim. App. 2011). *See* TEX. PENAL CODE § 6.03 (describing application of mental states to these "conduct elements").

[35] *Soliz v. State*, 353 S.W.3d 850, 854 (Tex. Crim. App. 2011) (emphasis added).

a period of time.'"[36] Its unanimity clause confirms this; the jury need not unanimously agree on the acts of sexual abuse, only "that the defendant, during a period that is 30 or more days in duration, committed two or more acts of sexual abuse."[37] The relative ages of the defendant and victim(s) is another circumstance.[38]

In fairness, a "circumstances of conduct" offense typically presents otherwise innocent behavior that is made criminal by the attendant circumstances,[39] and there is nothing innocent about the predicate offenses of CSA. However, CSA would not be the first Texas offense to combine established illegality with additional circumstances to create a new offense. For example, "engaging in organized criminal activity [EOCA] is a 'circumstances of the conduct,' offense, the circumstance being the existence or creation of a combination that collaborates in carrying out criminal activities."[40] Similarly, aggregate theft does exactly what the title suggests—it combines multiple theft offenses into a greater offense based on the existence of "one

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[36] *Id*. at 853 (quoting the bill analysis).

[37] TEX. PENAL CODE § 21.02(d).

[38] TEX. PENAL CODE § 21.02(b)(2). The offense also has an age-based affirmative defense not applicable here. TEX. PENAL CODE § 21.02(g)(1)(A) ("It is an affirmative defense to prosecution under this section that the actor . . . was not more than five years older than . . . the victim of the offense, if the offense is alleged to have been committed against only one victim[.]").

[39] *Young*, 341 S.W.3d at 423 (discussing failure to register as a sex offender).

[40] *O'Brien v. State*, 544 S.W.3d 376, 384 (Tex. Crim. App. 2018). *See* TEX. PENAL CODE § 71.02(a).

scheme or continuing course of conduct."[41] And because the focus of each of these offenses is the circumstance, none of them require unanimity on the underlying illegal acts. The CSA statute says so explicitly, and this Court has construed EOCA and aggregate theft that way.[42]

II.C.2. Prohibited sexual conduct focuses on familial relationship.

Section 25.02 prohibits sex between certain family members regardless of age or consent. Its only mental state is knowledge of that familial relationship. When the only thing that makes intercourse illegal is the actor's knowledge of his relationship to the victim, it is a "circumstances surrounding the conduct" offense and that relationship is the gravamen.[43] In short, the gravamen of incest must be sex between family members.

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[41] *Kent v. State*, 483 S.W.3d 557, 561 (Tex. Crim. App. 2016) ("[T]he text of Section 31.09 shows a legislative intent to treat the 'scheme or continuing course of conduct' as the culpable criminal behavior rather than each individual theft used to prove the scheme or course of conduct.").

[42] *See O'Brien*, 544 S.W.3d at 391 ("[T]he jury does not have to agree on which specific offense was committed in an engaging case so long as everyone agrees that at least one of the listed offenses was committed as part of a collaboration in carrying out criminal activities."); *Kent*, 483 S.W.3d at 562 ("Every instance of theft need not be unanimously agreed upon by the jury."). *O'Brien* noted the separate, due process question of moral and conceptual equivalence. 544 S.W.3d at 393. By claiming two offenses are the "same," an appellant effectively concedes that point.

[43] *Huffman v. State*, 267 S.W.3d 902, 908 (Tex. Crim. App. 2008) ("When a culpable mental state is required to attach to a particular circumstance, it is because that circumstance is the gravamen of the offense.").

The court of appeals held that the "focus and unit of prosecution" of PSC as charged is the penetration.[44] It said that "what would principally distinguish the statutes here—consent—is irrelevant as charged" because children under fourteen cannot consent to sex.[45] The reason consent is irrelevant in both statutes is not irrelevant to this analysis—it is at the crux of it. In effect, that court disregarded the very thing that defines PSC and sets it apart—the relationship between the actor and other person.

II.D. The Legislature gave us a list of multiple-punishment violations PSC is not on.

In addition to the presumption of legislative intent for multiple punishments and the nigh decisive difference in gravamina, the Legislature provided a list of offenses additional convictions for which are prohibited. Prohibited sexual conduct is not on it. That should settle any question of legislative intent.

The CSA statute is comprehensive. It requires, *inter alia*, "two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims."[46] An "act of sexual abuse" is "a violation of one or more . . . penal laws" listed in Subsection (c). This list plays a central role because CSA has its own "multiple punishments" clauses based on it: Subsections (e) and (f).

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[44] *Ramos v. State*, No. 13-17-00429-CR, 2020 WL 4219574, at *10 (Tex. App.—Corpus Christi July 23, 2020, pet. granted) (not designated for publication).

[45] *Id*.

[46] TEX. PENAL CODE § 21.02(b)(1).

Subsection (e) says,

> A defendant may not be convicted in the same criminal action of an offense listed under Subsection (c) the victim of which is the same victim as a victim of the offense alleged under Subsection (b) unless the offense listed in Subsection (c):
>
> (1) is charged in the alternative;
>
> (2) occurred outside the period in which the offense alleged under Subsection (b) was committed; or
>
> (3) is considered by the trier of fact to be a lesser included offense of the offense alleged under Subsection (b).[47]

As this Court held in *Soliz v. State*, "Subsection (e) prevents the State from mixing a § 21.02 count with a count for a discrete sexual offense that could have served as part of the § 21.02 count."[48] This is a legislative directive that multiple punishments are prohibited.

Subsection (f) says, "A defendant may not be charged with more than one count under Subsection (b) if all of the specific acts of sexual abuse that are alleged to have been committed are alleged to have been committed against a single victim."[49] This is another legislative directive prohibiting multiple punishments.

Again, both directives are based on the list of offenses in Subsection (c). This Court extended coverage of that list to include the attempted commission of one of the listed offenses in part because attempted predicates are included as a matter of

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[47] TEX. PENAL CODE § 21.02(e).

[48] *Soliz*, 353 S.W.3d at 852.

[49] TEX. PENAL CODE § 21.02(f).

law.[50] But it refused to say that out-of-state conduct that would violate one of the enumerated predicates count.[51] That is, the predicates are what they are: specific Texas statutes. The Legislature chose not to put PSC on the list. That should matter.

This Court has addressed the Legislature's decisions to include specific predicate language. When asked to consider whether EOCA includes as predicate offenses those not plainly listed in the statute, this Court's approach was clear:

> [I]f the Legislature wanted to reference specific statutory sections to identify viable predicate offenses, it could have done so. In fact, the Legislature did just that in other statutory subsections. . . . And, when our Legislature wanted to designate a broader array of offenses within a statutory scheme, it identified possible predicate offenses as contained within statutory chapters.
> . . .
> The Legislature knows how to specifically reference chapters, headings, and sections in the Penal Code, as well as other codes, so that all offenses under those chapters, headings, and sections are included within that reference.[52]

As applied to EOCA, this Court concluded that the absence of plain language

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[50] *Price v. State*, 434 S.W.3d 601, 607-11 (Tex. Crim. App. 2014) (finding the statutory language ambiguous but concluding that legislative history and the fact that attempt is a lesser-included offense by statute—TEX. CODE CRIM. PROC. art. 37.09(4)—supported the prohibition).

[51] *Lee v. State*, 537 S.W.3d 924, 926-27 (Tex. Crim. App. 2017). This is in contrast to other statutory schemes that authorize use of out-of-state convictions of sufficient similarity to Texas offenses. *See*, *e.g.*, TEX. PENAL CODE §§ 12.42(c)(2)(B)(v), 12.42(c)(3)(B)(ii), 12.42(c)(4)(B), 12.42(g)(2) (all allowing enhancement based in part on convictions under the laws of another state containing substantial similarities to a Texas counterpart); *Crabtree v. State*, 389 S.W.3d 820, 826 (Tex. Crim. App. 2012) (under TEX. CODE CRIM. PROC. art. 62.003(a), the duty to register based on an extra-jurisdictional conviction or adjudication requires a DPS determination of substantial similarity to a Texas offense).

[52] *Hughitt v. State*, 583 S.W.3d 623, 630-31 (Tex. Crim. App. 2019).

referring to the Health and Safety Code or its offense headings showed that those offenses were not intended to be predicates.[53]

This reasoning is similar to that used in *Fraser v. State*, where the Court declined to (further) deviate from the statutory language of the felony murder statute.[54] That statute prohibits manslaughter from being used as the predicate felony.[55] This Court had previously held that a lesser-included offense of manslaughter could not be used,[56] but it refused to apply the cognate-pleadings approach to expand the offenses excluded by the statute itself. "The only principled approach to the felony-murder statute's manslaughter exclusion is to look solely to the statutory elements of manslaughter in determining lesser-included offenses."[57] That reasoning applies here.

The same considerations that inform whether a statute shows the legislative intent to use an offense as a predicate should also inform whether a statute shows the legislative intent to prohibit multiple punishments. But for the existence of

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[53] *Id*. at 631.

[54] *Fraser v. State*, 583 S.W.3d 564, 569 (Tex. Crim. App. 2019), reh'g denied (Oct. 30, 2019).

[55] TEX. PENAL CODE § 19.02(b)(3).

[56] *Johnson v. State*, 4 S.W.3d 254, 258 (Tex. Crim. App. 1999) ("[A] conviction for felony murder under section 19.02(b)(3), will not lie when the underlying felony is manslaughter or a lesser included offense of manslaughter.").

[57] *Fraser*, 583 S.W.3d at 569.

Subsection (e), it could be argued that the list of predicate offenses is just that—some evidence that the Legislature limited what offenses are lesser-included offenses of CSA as a matter of law. By virtue of Subsection (e), however, the Legislature showed that it considered the multiple-punishments question and tied it to that list. Including PSC in subsection (c) would have clearly demonstrated both that the State may use PSC as a predicate and that it could not obtain a conviction for both. The Legislature presumably put some thought into what offenses could be predicates and would therefore fall within its comprehensive scheme concerning multiple punishments.[58] Section 21.02 went into effect in 2007. Section 25.02 has been in the Penal Code since 1974. The Legislature has had every chance to include it as a predicate offense, yet it has not.

In short, this statute presents as good an example as one will find of "the maxim *expressio unius est exclusio alterius*—expressing one thing implies the exclusion of what was not expressed."[59] "[T]he maxim operates only when a comprehensive treatment of the subject matter is intended or when addressing an

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[58] *See*, *e.g.*, TEX. PENAL CODE § 21.02(c)(2) (including indecency with a child by sexual contact but excluding touching the breast of a child).

[59] *Ex parte Campbell*, 267 S.W.3d 916, 923 (Tex. Crim. App. 2008).

exception to a general rule."[60] Also called "negative implication,"[61] this "product of logic and common sense"[62] is as fitting here as in any case.

II.E. Conclusion

If a multiple-punishments analysis compares the two offenses that give rise to the multiple punishments, this is an easy case. The presumption, gravamina, and statutory scheme all favor permitting convictions for sex offenses that vindicate different societal interests.

III. The concept of "jeopardy adjacent" is not a good fit for CSA.

The court of appeals ultimately based its holding not on comparison of PSC to CSA but to one of the charged predicate offenses, aggravated assault of a child by penetration.[63] As explained below, this is a version of the transitive property applied by Judge Price in his concurrence to *Price*, and applied in part to a lesser-included analysis by this Court in *Ex parte Castillo.* It has never been applied in this context, at least not explicitly. If comparison of the two offenses of conviction is not the proper analysis, the outcome is the same. The route is just more circuitous.

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60 *Id*.

61 *Chase v. State*, 448 S.W.3d 6, 14 (Tex. Crim. App. 2014).

62 *Ex parte Campbell*, 267 S.W.3d at 923.

63 *Ramos*, 2020 WL 4219574, at *10.

III.A. Some multiple punishment questions can be settled by simple math.

When this Court decided that the Legislature did not intend convictions for both CSA and the attempted commission of a predicate offense, it did so based primarily on legislative history. Judge Price would have reached the same conclusion more directly. If the Legislature did not intend punishment for both CSA and a predicate, he reasoned, it did not intend punishment for both CSA and an offense that is the "same" as one of the predicates as a matter of statutory law.[64] "This is but an application of the transitive property: If a = b, and b = c, then a = c."[65]

This Court applied the transitive property in *Ex parte Castillo*, a successive-prosecution jeopardy case. There, the Court held that capital murder is the same as aggravated assault by causing serious bodily injury or by using or exhibiting a deadly weapon while causing bodily injury.[66] "[B]ecause death is a type of serious bodily injury and serious bodily injury is a type of bodily injury, it necessarily follows that death is a type of bodily injury."[67] "This logic is simply an application of the

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[64] *Price*, 434 S.W.3d at 612 (Price, J., concurring) (citing TEX. CODE CRIM. PROC. art. 37.09(4)).

[65] *Id*. at 612 n.9.

[66] *Ex parte Castillo*, 469 S.W.3d 165, 171 (Tex. Crim. App. 2015).

[67] *Id*.

transitive property of equality that if a = b, and b = c, then a = c."[68] This Court cited, *inter alia*, Article 37.09(2).

There is thus precedent, and good reason, to apply this logic. When simple application of Article 37.09 shows that two offenses stand in a greater/lesser relationship, it should be assumed the Legislature was aware of it and intended to prohibit multiple punishments. When the right case presents itself, this rule should be applied.

III.B. This offense is not one of them.

Applying the transitive property in this situation is not so simple, either conceptually or in application. With this Court's liberal "*Blockburger* plus" framework, the neat "If a=b, and b=c . . ." formula gives way to a looser, "If a=b, and b is sufficiently like c when considering a non-exhaustive list of factors . . ." test. It sounds good in principle, but it raises two questions: why is it necessary, and should it be permitted? The former answers the latter.

Analysis applying the full cognate-*Blockburger*/*Ervin* regime to a charged predicate offense instead of CSA—the other "punishment" in this "multiple punishments" case—became necessary because comparing it to CSA itself did not show a violation. It is unclear how the result could be different, however. If the

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[68] *Id*. at 171 n.12.

normal framework already looks to the factual allegations to ferret out functional equivalence or imputed theories of liability, they should be discovered regardless of whether the analysis is framed as an "a to b" or "b to c" comparison. The allegations are the allegations. Maybe this is what the court of appeals was doing when it focused on the predicate offense before concluding PSC was jeopardy barred by the CSA conviction.

The problem is that focusing explicitly on CSA's lesser predicate offense meant the court of appeals could ignore CSA's gravamen—usually the most important indicator of legislative intent. It may also be the reason that court never circled back to the presumption in favor of multiple punishments created by comparing CSA and PSC.[69] It may also explain why Subsection (e) went unmentioned. In other words, transitive analysis may highlight some relevant considerations but it does so at the expense of the most important ones. It is difficult to get the right answer when you ask the wrong question. At least with CSA, this kind of transitive analysis will always ask the wrong question. It should be rejected *ab initio*.

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[69] *Ramos*, 2020 WL 4219574, at *7-9.

III.C. A few words about preservation.

In its petition, the State argued that using a transitive analysis presents a preservation problem because a jeopardy violation is not clearly apparent from the face of the record.[70] The State was technically correct but it might not matter.

To be clear, appellant has not preserved a constitutional claim. There can be no Double Jeopardy multiple-punishments claim unless a defendant was punished for conduct more times than the Legislature intended. That is, he must stand convicted and punished more than once for that conduct. Appellant cannot show that happened in this case. The conduct at the heart of the court of appeals's analysis is appellant's penetration of the victim's sexual organ with his sexual organ. But that happened multiple times, and there was evidence that maybe some of those times were "mere" contacts, and also some evidence supporting the allegation that appellant touched the victim's sexual organ with his hand during the alleged time frame. Jurors needed only to find two discrete acts of abuse, and they did not have to say which. As a result, no one can say with certainty that appellant was punished twice for the same act of penetration through CSA and PSC. Under a strict application of *Gonzalez*, this transitive approach to jeopardy is not presented for review.

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[70] *See Gonzalez v. State*, 8 S.W.3d 640, 643 (Tex. Crim. App. 2000) (permitting an appellant to raise a double jeopardy claim for the first time on "when the undisputed facts show the double jeopardy violation is clearly apparent on the face of the record and when enforcement of usual rules of procedural default serves no legitimate state interests.").

However, a bare statutory claim that these convictions violate the Legislature's intent would be apparent from the face of the record. This is because the statutory scheme the State relies upon so heavily cuts both ways. Subsection (e) prohibits, in this case, convictions in the same criminal action for both CSA and "an offense listed under Subsection (c)."[71] Importantly, it does not require that the predicate offense be charged in the CSA case. That makes sense, as one of the purposes of this provision (as held in *Soliz*) is to prevent carving of a single period of continuous sexual abuse into both a CSA conviction and (perhaps) multiple, stackable convictions for sexual offenses committed against the same child.[72] The upshot for preservation purposes is that, at least with CSA in this case, preservation does not rise or fall with the ability to determine which predicate offenses the jury relied on for conviction. If an additional conviction for "an offense listed under Subsection (c)" cannot be had regardless of whether it was a charged predicate, it should not matter whether the jury considered it when it was a charged predicate. By extension, the record would not prevent consideration of a transitive analysis as a standalone statutory violation of legislative intent.

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[71] TEX. PENAL CODE § 21.02(e).

[72] *See* TEX. PENAL CODE § 3.03(b)(2)(A) (permitting stacking of convictions for both CSA and PSC arising out of the same criminal episode).

The problem is that appellant did not make a standalone statutory claim, even on appeal. If he had, there appears no reason why the principles of *Gonzalez* would not apply, especially when the statute evincing the Legislature's intent provides greater opportunity for review of his core, transitive argument (assuming it does not foreclose it entirely) than a constitutional claim would. The guts of both arguments are the same—discernment of legislative intent primarily through statutory analysis. Appellant even invoked Subsection (e) as part of his analysis of legislative intent.[73] Is the fact that it was packaged as part of a constitutional claim—one that requires more proof than a statutory claim—fatal? Luckily, this Court can avoid that question.

III.D. Transitive analysis fails on the merits.

If this Court holds that transitive analysis is appropriate notwithstanding this Court's jurisprudence and Subsection (e), the inquiry into legislative intent is largely the same as in the comparison of PSC to CSA. Aggravated sexual assault of a child by penetration of a sexual organ with a sexual organ, as charged as part of the CSA indictment,[74] and PSC each have an element the other does not; one requires a child, the other requires a specific familial relationship. Multiple punishments are presumptively authorized. As the court of appeals acknowledged, the gravamen of

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[73] App. Br. to CoA at 49, 51, 57.

[74] 1 CR 7.

aggravated sexual assault by penetration is the penetration.[75] As discussed above, the gravamen of PSC is the familial relationship. The "best indicator of legislative intent" (short of an explicit statutory statement) thus also favors multiple punishments. The comparison of "other" *Ervin* factors plays out similarly to the comparison between CSA and PSC; similar names but different Titles of the Penal Code and different offense levels.[76] In short, there is no clear evidence of intent to rebut the presumption that multiple punishments are permitted.

PRAYER FOR RELIEF

WHEREFORE, the State of Texas prays that the Court of Criminal Appeals reverse the judgment of the Court of Appeals and affirm appellant's convictions.

Respectfully submitted,

/s/ John R. Messinger

JOHN R. MESSINGER
Assistant State Prosecuting Attorney
Bar I.D. No. 24053705

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

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[75] *Ramos*, 2020 WL 4219574, at *10 (citing *Jourdan v. State*, 428 S.W.3d 86, 95-96 (Tex. Crim. App. 2014)).

[76] TEX. PENAL CODE § 22.021(e) (first degree felony as charged).

CERTIFICATE OF COMPLIANCE

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/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 20 day of November, 2020, the State's Brief on the Merits has been eFiled and electronically served on the following:

Luis Gonzalez
Hidalgo County Assistant Criminal District Attorney
100 East Cano
Edinburg, Texas 78539
luis.gonzalez@da.co.hidalgo.tx.us

Defense counsel will be notified when he or she is appointed.

/s/ John R. Messinger
John R. Messinger
Assistant State Prosecuting Attorney

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Bar No. 24053705
information@spa.texas.gov
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Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Luis Gonzalez		luis.gonzalez@da.co.hidalgo.tx.us	11/20/2020 2:45:12 PM	SENT